IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MORRIS KOTOFSKY et al.	:	CIVIL ACTION
v.	:	
ALBERT EINSTEIN MEDICAL CENTER and JOHN BELL-THOMPSON, M.D.	:	NO. 98-3416

O'NEILL, J. OCTOBER , 2000

MEMORANDUM

Plaintiff Morris Kotofsky filed this suit alleging that he had negligently been infected with HIV during a blood transfusion.[1] Kotofsky sued the American Red Cross, the Albert Einstein Medical Center ("AEMC") and John Bell-Thompson M.D. ("Thompson") in Pennsylvania state court. On July 2, 1998 the action was removed to this Court pursuant to 28 U.S.C. § 1446. [2] On August 14, 2000 plaintiff's suit against the Red Cross was dismissed by stipulation of the parties. [3] Remaining before me are defendant Thompson's motion for summary judgment, defendant AEMC's motion for summary judgment and plaintiff's second motion to

[1] Janice Kotofsky asserts a claim for loss of consortium as a result of the alleged injuries to her husband. Her claims are wholly derivative of his and I will hereafter refer to Mr. Kotofsky as plaintiff.

[2] The case was removed by defendant Red Cross under American National Red Cross v. S.G., 505 U.S. 247 (1992)(holding that the Red Cross' charter creates original federal jurisdiction over suits involving the Red Cross).

[3] This case has been before me for over two years and a considerable amount of time and expense have been invested by the remaining parties. Despite the absence of the Red Cross, upon considerations of judicial economy, convenience, and fairness I will retain jurisdiction of the remaining pendant state claims in this case. See Hedges v. Musco, 204 F.3d 109, 123 (3d Cir. 2000).

reopen discovery and revise my scheduling order.

BACKGROUND

Kotofsky was an inpatient at AEMC from November 1, 1991 until November 28, 1991. On November 13, 1991 Kotofsky signed a document entitled "Consent to Transfusion of Blood and Blood Components and Release." This form was created by AEMC and according to plaintiff did not contain any language discussing alternatives to the transfusion of blood or to the use of blood components supplied by or through AEMC. On November 14, 1991 Dr. Thompson performed triple bypass surgery on Kotofsky. Following the procedure Kotofsky received one unit of packed red blood cells supplied by the Red Cross. Kotofsky was diagnosed as HIV positive on or about June 6, 1996. The unit of blood transfused to Kotofsky in 1991 was the subject of an American Red Cross "look back" investigation. It was determined that the donor had various risk factors for HIV and/or was HIV positive at some point subsequent to his donation of blood.

Plaintiff alleges that defendants voluntarily undertook a duty to obtain Kotofsky's informed consent to the blood transfusion. Defendants allegedly breached this duty by failing to inform Kotofsky of the risk of HIV transmission associated with receiving a blood transfusion from unknown donors, and were negligent in failing to inform him of the hospital's directed donor program, whereby a patient may elect to have blood withdrawn prior to surgery or have blood donated by family members for use should a transfusion prove necessary.

On March 16, 1999 AEMC and Thompson moved to dismiss the case for failure to state a

claim under Fed. R. Civ. P. 12(b)(6). This motion was denied in part and granted in part.[4] I issued a revised scheduling order on January 18, 2000 closing discovery on April 21, 2000 and directing plaintiff to designate experts by May 13, 2000. On May 26, 2000 plaintiff moved to reopen discovery and revise the scheduling order. I denied this motion on June 7, 2000 and directed plaintiffs to make a good faith effort to complete discovery within thirty days of that date. Both remaining defendants move for summary judgment on the grounds that plaintiff has failed to designate an expert or produce an expert report and therefore under Pennsylvania law cannot establish a prima facie claim of medical malpractice. Plaintiff has filed a second motion to reopen discovery and revise the scheduling order.

I. SUMMARY JUDGMENT

Standard of Review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court's task is not to resolve disputed issues of fact, but to determine whether there exists any factual issues to be tried. See Andersen v. Liberty Lobby, Inc., 477 U.S. 242, 247-49 (1986). In making this determination, all of the facts must be viewed

[4] In their response to defendants' motion to dismiss plaintiff conceded that defendants could not be held liable for failing to investigate and ensure the blood was free from disease and I granted defendants' motion as to that claim. I rejected defendants' arguments that plaintiff's claim was barred by Pennsylvania's "Blood Shield" law, 42 P.S. § 8333, or that plaintiff's claim based on lack of consent should be dismissed because either (A) defendants had no duty under Pennsylvania law to obtain Kotofsky's informed consent or (B) a negligence-based informed consent claim does not constitute a viable cause of action.

in the light most favorable to the non-moving party. Id. at 248. However, the non-moving party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989). The non-moving party cannot survive by relying on unsupported assertions, conclusory allegations, or mere suspicions. Id.

Discussion

It is well settled under Pennsylvania law that "[t]o establish a prima facie case of medical malpractice, a plaintiff must produce expert testimony that establishes the recognized standard of care attributable to physicians under like circumstances." Fox v. Horn, No. CIV. A. 98-5279, 2000 WL 49373 at *6 (E.D. Pa. Jan. 21, 2000) (citing Brannan v. Lankenau Hospital, 490 Pa. 588 (1980)). A plaintiff must present expert testimony to establish to a reasonable degree of medical certainty that the defendant's acts deviated from an accepted medical standard and that such deviation was the proximate cause of plaintiff's injuries. See Tuman v. Genesis Assocs., 935 F. Supp. 1375, 1386 (E.D. Pa. 1996), citing Mitzelfelt v. Kamrin, 526 Pa. 55 (1990).

Defendants base their motions for summary judgment on the failure of plaintiff to designate an expert or file any expert reports to support their claim of medical malpractice. However, this assertion misconstrues the nature of plaintiff's claim. Kotofsky does not allege medical malpractice in the traditional sense. [5] Kotofsky claims that defendants voluntarily

[5] Malpractice - "Failure of one rendering professional services to exercise that degree of skill and learning applied under all the circumstances in the community by the average prudent, reputable member of the profession with the result of injury, loss or damage to the recipient of those services or to those entitled to rely upon them." Black's Law Dictionary 959 (6th ed. 1990).

assumed a duty to obtain his informed consent and failed to use reasonable care in performing that duty. As I stated in ruling on defendants' motion to dismiss, see No. CIV. A. 3416, 1999 WL 712584 (E.D. Pa. Sept.10 1999), at least one court within this district has found that such allegations state a viable claim. See Jones v. Philadelphia of College of Osteopathic Medicine, 813 F. Supp. 1125 (E.D. Pa. 1993). In Philadelphia College a hospital prepared and distributed to plaintiff a consent to blood transfusion form bearing its own name and logo. The Jones court held that allegations that the hospital had "gratuitously undertaken this obligation and therefore ha[d] a duty to make certain that the informed consent forms fully inform patients. . . of the risks associated with blood transfusion" may indeed state a cause of action. Id. In analyzing Philadelphia College in Davis v. Hoffman, 972 F. Supp. 308, 312 (E.D. Pa. 1997) , Judge Gawthrop noted that it was

> but an example, in the medical context, of general negligence law concerning duty. One has, for example, no duty to drive one's neighbor to the airport. But if one nevertheless volunteers to undertake that good-neighborly task, and then drives negligently, causing the neighbor to be injured en route, one is held legally accountable.

Thus Kotofsky's claim is closer to ordinary negligence than to medical malpractice. In order to survive defendants' motions for summary judgment Kotofsky must demonstrate that there exist disputed issues of material fact with respect to his claim that defendants owed him a duty, breached that duty and that such breach caused him to suffer an injury.[6]

Plaintiff attached a number of exhibits to his reply to defendant's motion for summary

[6] Under Pennsylvania law the elements of a cause of action in negligence are: (1) a duty recognized by law, requiring the actor to conform to a certain standard with respect to the injured party; (2) a failure of the actor to conform to that standard; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damage to the interests of another. See Baer v. Commonwealth of Pennsylvania, 713 A.2d. 189, 191 (Pa. Commw. Ct. 1998).

judgment that include factual support for his allegations. For example, Exhibit F contains excerpts from the deposition of Ishmael Daskal, Ph.D, the director of the blood bank at AEMC at the time of Kotofsky's transfusion. Dr. Daskal testified that alternative transfusion methods existed at the time of plaintiff's operation and that he did not recall either the Red Cross or AEMC placing any limits on the use of these methods. Taking the facts in the light most favorable to the non-moving party I find plaintiff has met his burden of demonstrating that genuine issues of material fact exist as to whether defendants breached a duty of care to Kotofsky.

II. Motion to Reopen Discovery and Revise the Scheduling Order

Plaintiff has moved to reopen discovery and revise the scheduling order I issued on January 18, 2000. Plaintiff's motion is based on an earlier denial of his request to revise the January order wherein I stated that if plaintiff made a good faith effort to complete discovery and could show a legitimate need for extension of the discovery cut-off date he could renew his motion. See Order of this Court dated June 7, 2000. Plaintiff maintains that he has made such a good faith effort and has been unable to obtain one deposition, that of Beth Turnbaugh who is presently working on a restricted army base in the Marshall Islands. Turnbaugh is a former AEMC employee who worked with the Blood Bank in 1990-1991 and is alleged to be familiar with the designated donor program at AEMC as it existed at the time of plaintiff's operation. Plaintiff has already submitted to defense counsel written questions for Turnbaugh pursuant to Fed. R. Civ. P. 31. He further suggests an acceleration of the time frames provided in Rule 31 "in the interest of justice." Plaintiff also asks me to extend the expert report deadlines "in order

to enable [p]laintiffs to avoid summary judgment."

This case was originally filed in state court in June, 1998. I issued a revised scheduling order on January 18, 2000 closing discovery on April 21, 2000 and directing plaintiff to designate experts by May 13, 2000. Plaintiff has therefore had close to two years to locate and retain an expert in this matter. I decline to extend this deadline further. It is not my role to keep the claims of parties alive indefinitely. As I determined above however, this does not mean that Kotofsky's claim automatically falls victim to defendants' summary judgment motions as an expert is not required to establish a prima facie case of ordinary negligence.

Plaintiff's request to reopen discovery is also denied with the exception that plaintiffs may take the deposition of Beth Turnbaugh through written questions pursuant to Fed. R. Civ. P. 31. As plaintiff has already submitted questions for Turnbaugh to defendants, defendants are to submit any questions of their own to all parties within ten business days of the date of this Order. Plaintiff will have three business days from the receipt of defendants' questions to submit any further questions of his own. Ms. Turnbaugh is to have her responses notarized and returned to all parties with all possible speed.

An appropriate Order follows

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ORDER

AND NOW, this day of October, 2000, in consideration of defendant John Bell-Thompson's motion for summary judgment, defendant Albert Einstein Medical Center's motion for summary judgment, plaintiff's response thereto, and plaintiff's motion to reopen discovery and revise the scheduling Order dated January 18, 2000, it is ORDERED that:

1. Defendant John-Bell Thompson's motion for summary judgment is DENIED.
2. Defendant Albert Einstein Medical College's motion for summary judgment is DENIED.
3. Plaintiff's motion to reopen discovery and revise the scheduling Order is DENIED in part and GRANTED in part.

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THOMAS N. O'NEILL, JR., J.